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IN THE

Supreme Court of the United States

October Term, 1963

No. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1962

No. 748

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

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THE STATE OF FLORIDA,

Appellee.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

INTRODUCTION

The opinion below, substantive facts and procedural steps, statute involved, and question presented in the

case at bar may be found in appellants' Jurisdictional Statement, pp. 1-5. Appellee's Motion does not deny the correctness of the foregoing items (pp. 1-2).

Although appellee's Motion is stated to be based on the lack of a substantial federal question in the instant case, appellee does not seek to demonstrate such lack but instead argues the merits of the case, relying on (1) the absence of racially discriminatory language in Florida Statutes, Sec. 509.141 and (2) individual "liberty of contract". Such reliance is totally misplaced.

APPELLANTS DO NOT ATTACK THE STATUTE INVOLVED ON ITS FACE BUT ITS **APPLICATION** IN THE CASE AT BAR IN VIOLATION OF APPELLANTS' RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE FEDERAL GUARANTEE OF PRIVILEGES AND IMMUNITIES OF STATE AND FEDERAL CITIZENSHIP.

It is undisputed that the Florida statute involved and the criminal information under which appellants were convicted proscribe refusal of restaurant guests to leave the premises after the manager or other person in charge so requests on the basis of his opinion that serving such guests would be "detrimental" to the restaurant. Nor is it disputed that in the case at bar the manager of the Shell City Restaurant had the "opinion" that serving appellants would be "detrimental" since the store's **admitted** policy was to serve Negroes in 18 of its 19 de-

partments but not in the 19th which is the Restaurant (R. 40, 50-53; Jurisdictional Statement p. 5). Thus the record is clear that appellants are attacking the constitutionality of the state statute here involved **as applied** in a racially discriminatory manner.

It should be noted that appellee's illustrative "reasonable hypothetical" on p. 4 of its Motion, involving "a group of **unruly**, white Anglo-Saxons" (emphasis supplied) convicted under Florida Statutes, Sec. 509.141, is in **no** way analagous to the instant case. Indeed, appellee does not question the accuracy of the following sentence in appellant's Jurisdictional Statement at p. 5: "The information does not charge, nor does the record contain any allegation or evidence that Appellants were boisterous, noisy or unruly or otherwise engaged in any disorderly conduct."

The racially discriminatory **application** of the state statute involved is obviously the gravamen to appellants' appeal to this Court.

WHETHER OR NOT A STATE VIOLATES THE CONSTITUTION IN ENFORCING A POLICY OF RACIAL DISCRIMINATION ON THE PART OF A PRIVATE RESTAURANT OTHERWISE OPEN TO THE GENERAL PUBLIC PRESENTS A SUBSTANTIAL FEDERAL QUESTION

It seems self-evident that the issue stated above does present a substantial federal question. Surely the issue of whether or not a Negro has the constitutional right to use public restaurants without state interference **on**

account of his race or color is of great significance at the present time. Suffice to say that appellee does not question the crucial nature of the issue but seeks to prove it has already been decided. Appellee's Motion, however, cites **no** authority for a negative answer to the question presented. Indeed, appellee limited its "argument" to an attempt to distinguish the cases cited by appellants.

Appellants here reiterate their contention that this Court's holdings in **Shelley v. Kraemer**, 334 US 1, 68 SCt 836, 92 LEd 1161 (1948), **Marsh v. Alabama**, 326 US 501, 66 SCt 276, 90 LEd 265 (1946), and **Garner v. Louisiana**, 368 US 157, 82 SCt 248, 7 LEd2d 207 (1961), lead to the conclusion that the Constitution of the United States does not permit a state, through its police officers and court system, to enforce a racially discriminatory policy of a private restaurant otherwise open to the general public. See also **Valle v. Stengle**, 176 F2d 697 (1949).

In the **Garner** case, **supra**, this Court reversed breach-of-the-peace convictions for lack of evidence and stated at 368 US 174, 82 SCt 257 as follows (emphasis added):

> " . . . for petitioners to sit peacefully in a place where custom decreed they should not sit . . . is not evidence of any crime **and cannot be so considered either by the police or by the courts.**"

Although Mr. Justice Douglas' concurring opinion states that private restaurants "are public facilities in which the states may not enforce a policy of racial segregation" (368 US 157, 82 SCt 248, 7 LEd2d 207), the majority of this Court specifically did not reach "the broader constitutional questions presented" in the **Garner** case. Such

questions are clearly presented in the case at bar. Moreover, the Florida statute herein applied **does** make "mere presence" a crime under the circumstances and is a criminal trespass statute (unlike the Louisiana statute as noted by Mr. Justices Frankfurter and Harlan in their separate opinions in the **Garner** case).

In addition, the instant case is analagous to several other "sit-in" cases now pending before this Court in which oral argument has been had.

Appellants submit that the federal question presented in the case at bar is clearly substantial.

CONCLUSION

For the foregoing reasons, appellants submit that appellee's Motion to dismiss or affirm should be denied and that the substantial federal questions here presented warrant plenary consideration by this Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, HOWARD W. DIXON, Counsel for appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on April ___, 1963, I served copies of the foregoing Brief in Opposition to Appellee's Motion to Dismiss or Affirm on the appellee, State of Florida, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of RICHARD E. GERSTEIN, State Attorney, Dade County Courthouse, Miami, Florida, and by further mailing a copy thereof to the Honorable RICHARD ERVIN, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

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